IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

In the mater between:

	Case no J1935/09
CITY OF JOHANNESBURG	**Applicant**
And	
SOUTH AFRICAN MUNICIPAL	
WORKERS UNION ("SAMWU")	**First Respondent**
SAMUWU MEMEBERS EMPLOYED	
BY THE APPLICANT	**Second Respondent**

Judgment

Molahlehi J

Introduction

[1] The applicant, the City of Johannesburg sought an order on an urgent basis to interdict and restrain the first respondent (SAMWU) and its members from embarking on the planned strike which was to commence on 14 September 2009.

[2] The applicant has also applied for condonation for failure to comply with the requirements of section 68(3) of the Labour Relations Act 66 of 1995.

[3] SAMWU on the other hand has also applied for an order declaring that the bargaining council has jurisdiction to entertain its dispute concerning salary bands, pay progression and accrued sick leave.

[4] On the 14 September 2009, this Court made an order on the following terms:

> *"1. The provisions of the Rules relating to times and manner of service to therein are dispensed with and the matter is dealt with as one of urgency in terms of Rules for Conduct of Proceedings in the Labour Court.*
>
> *2. Failure by the Applicant to comply with the provisions of section 68(3) of the Labour Relations Act 66 of 1995 is condoned.*
>
> 3. *The Respondents are interdicted and restrained from embarking or organising or promoting a strike action scheduled to commence on 15th September 2009.*

4. *Should the Respondents embark on a strike action on 15 September 2009, such strike action shall be unlawful and unprotected.*

5. *Paragraph 3 of this order shall operate as an interim order pending the outcome of the interpretation dispute referred to the Bargaining Council for South African Local Government by the Applicants.*

6. *The counter application by the respondent to declare that the South African Local Government has jurisdiction to conciliate the dispute which had been referred to it by the respondent on 10th June 2009, is stayed pending the outcome of the interpretation dispute referred to the Bargaining Council for South African Local Government by the Applicant.*

7. *There is no order as to costs.*

Background facts

[5] The applicant employs a total of 12300 (twelve thousand) employees the majority of whom are represented by SAMWU, a union registered in terms of the Labour Relations Act and recognized by the applicant as

representative of its members. Both parties are members of the South African Bargaining Council, a bargaining council registered in terms of the Labour Relations Act whose powers and function are amongst other things to conclude collective bargaining, to enforce collective bargaining to prevent and resolve disputes etc.

[6] The relationship between SAMWU and the applicant is governed by the Main Collective Bargaining Agreement (the collective agreement) concluded during June 20007. The applicant's case with regard to the provisions of the collective agreement is mainly based on Part C. clause 1.1 which reads as follows:

> *" 1.1 Collective bargaining may be conducted at either the national level or divisional level and the appropriate forum shall be determined by having regard to the matter that is subject of collective bargaining."*

[7] Sub-clause 1.2 of the collective agreement provides for matters that shall be subject of collective bargaining at national level only. For the purposes of the dispute between the parties the relevant items are those provided for in sub-clause 1.2.1 and 1.2.8. These sub-clauses provide that wages, salaries and sick leave are matters to be negotiated at national

level only. The matters to be handled at divisional level are listed in sub-clause 1.3 of the collective agreement.

[8] The issue that gave rise to the present matter arose on the 10th June 2009, when SAMWU referred a dispute to the bargaining council. The nature and background facts of the dispute are described in annexure "A" attached to the referral form and are summarized as follows:.

> " *Summary of the Facts in Dispute*
>
> *Summary Back ground*
>
> *The city of Johannesburg Municipality is having a salary scale that has three bends in each an every job ob category. This salary scale has been in existence since 1990. Employees used to progress within the salary scale on the discretion of a Manager. Somewhere in 1995 the applicant through collective bargaining processes agreed with the Respondent to froze or suspend the progression within the bends with an aim of addressing salary disparities that were caused by the amalgamation of black and former white local authorities.*
>
> *Around 2006 we have started raising this issue at the Bargaining Committee with an aim of reintroducing the progression that was earlier stopped by both parties. The*

progression that we want is based on the salary scale that is applicable within the city of Johannesburg Municipality. Our demand is as follows;

1. Newly employed without the necessary experience - must be given an entry salary (this is consistent with the city Remuneration Policy).

2. Employees who can perform the job independently with minimal supervision (2 years service) must be paid a median bend of the applicable salary scale.

3. Employees who have more experience performing the same function for the number of years (3 years) must be paid the top notch bend of the applicable salary.

In the Bargaining Committee that was held on the 09 and 10 September 2008, the employer requested to be given an opportunity to get a mandate from their principals. They committed themselves that it might take three months for them to solicit the mandate from their mandating committee.

On the 27 May 2009 another Bargaining Committee was convened and on that date still the Respondent did not have a mandate to address the demand of salary progression. We

promised when the meeting adjourned that we will give them our proposal that we have tabled with them on the 09 and 10 September 2008.

We later gave a written submission of our demand as tabled on the 09 and 10 September 2008. A follow up meeting was to take place on the 05 June 2009. In that meeting, the Respondent did not present any counter proposal In our demand for salary progression, we decided to refer this matter to Conciliation.

it is our view that this is mutual interest dispute and in the event that parties do not reach an agreement on or before conciliation we will have a legal right to participate on a protected strike action.

It is evident that we do not have a collective agreement that seek to regulate matters which may not be issues in dispute for the purpose of strike or lock-outs. Our Bargaining Council have not determined by collective agreement matters which may not be issues in dispute for the purpose of strikes or lock-outs.

Our view is that this demand can be addressed by the city of Johannesburg Municipality and it is a local is5ue where parties can collectively bargain at departmental level as we have done.

Accrued Sick Leave

There has been ongoing negotiations with regard to the accumulated sick leave of employees employed by the City of Johannesburg Municipality. Our demand was that all employees who have accumulated sick leave must be paid those days instead of them forfeiting those days. The Respondent has pronounced in the Bargaining Committee meeting that was held on the 05 June 2009 that it is not prepared to accede to our demand."

[9] The applicant contends in its founding affidavit that the issue raised by SAMWU in its referral is an old issue concerning salary bands and salary progressions which have been dealt with in the past. The applicant relies in this respect on the ruling which had been issued by the panelist of the bargaining council in the matter between *Independent Municipal and Allied Workers Union and another v City of Johannesburg issued under case number JMD060902.* In that matter the panelist disagreed with the contention of the unions including SAMWU, that they were entitled to go

on strike after the lapse of 30 (thirty) days from the date of the referral of the dispute. The panelist observed that the 30 (thirty) days period applies in a case where the dispute has been referred to the correct forum. The panelist found in that matter that the dispute was referred to an incorrect forum being the divisional instead of the national level. It was for that reason that the panelist found that the divisional level lacked jurisdiction and accordingly upheld the point raised by the City of Johannesburg that the divisional level lacked jurisdiction to entertain the dispute. The second point in limine raised in that matter which is similar to the point raised by the applicant in the present matter concerned the question of whether or not the divisional level of the bargaining council can entertain such issues. The panelist upheld the point raised by the City of Johannesburg and ruled that the unions needed to refer their dispute to the national level.

[10] The applicant has also referred a dispute to the bargaining council concerning the interpretation of whether or not the bargaining council can entertain a dispute concerning whether the divisional level has jurisdiction to entertain disputes relating to issues that are bargained for at national level.

[11]It is important to note that SAMWU referred the dispute on the 10th June 2009 and gave the applicant notice of its intention to embark on a strike on the basis that 30 (thirty) days have expired on the 1st September 2009. It is evidently clear that by the time the notice to go on strike was issued the 30 (thirty) days from the date of the referral had expired.

Application for condonation

[12] The issue that has arisen on the facts of this matter relates to failure by the applicant to comply with the provisions of section 68(3) of the Labour Relations Act. Sections 68(2) and (3) read as follows:

> *"(2) The Labour Court may not grant any order in terms of subsection (1)(a) unless 48 hours' notice of the application has been given to the respondent: However, the Court may permit a shorter period of notice if -*
>
> *(a) the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;*
>
> *(b) the respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and*

(c) the applicant has shown good cause why a period shorter than 48 hours should be permitted.

(3) Despite subsection (2), if written notice of the commencement of the proposed strike or lock-out was given to the applicant at least 10 days before the commencement of the proposed strike or lock-out, the applicant must give at least five days' notice to the respondent of an application for an order in terms of subsection (l)(a)."

[13] It is common cause that the applicant gave the respondent notice of the intention to institute the present proceedings which does not comply with the provisions of section 68(3) of the Labour Relations Act. An application for condonation for non compliance was brought from the bar by Mr Kennedy for the applicant. In the circumstances of the case this Court accepted and considered the application as such.

[14] Whilst subsection (2) of Section 68 allows for condonation of a period shorter than 48 hours on good cause shown by the applicant, subsection (3) is silent on this aspect.

[15]In *Auto Manufacturers Employers' Organization v NUMSA (1998) 11 BLLR 1116 (LC)*, a case which SAMWU relied on in its contention, the court held that the notice of application to be given in terms section 68(2) or (3) of the Labour Relations Act, is a notice of motion which has to be accompanied by the supporting affidavit. The Court further held that non compliance with the 5-day notice period in section 68(3) of the Labour Relations Act cannot be condoned.

[16]I was also referred to cases of *South African Airways (Pty) Ltd v SATAWU & others case number J2525/08 and Merafong Municipality v SAMWU & others case number J501/09.* In the case of the *South African Airways*, where the court dismissed the application to interdict the strike, no reasons were given. In the *Merafong Manucipality* the Court dismissed the urgent application which had been brought by the applicant and delivered an ex tempore judgement which was never transcribed.

[17]In *Automobile Manufacturers,* Landmann J in arriving at the conclusion that condonation cannot be granted for failure to comply with the time frame provided for in section 68(3) relied on what is stated by Du Toit et al, The Labour Relations Act of 1995 2ed at 220, where the Learned authors in commenting about section 68(3), had the following to say:

"Where an applicant has received at least ten days written notice of a proposed strike or lock-out, it must give the respondent at least five days written notice of its intention to apply for an interdict (section 68(3)). There is no provision for an abridgement if the five-day period, even on the grounds of urgency."

[18] I hold a different view to that expressed by Landmann J and will, for obvious reasons, not express any view in relation to the *Merafong Municipality* and the *South African Airways* cases. My view with regard to the *Automobile Manufacturers* case is that that judgment was clearly wrong. That case is clearly wrong because it is not in line with the approach adopted in the Labour Appeal Court in dealing with instances where legislation or the rules provide for time frames but remain silent on the need to show good cause in the event of non compliance. I accordingly with due respect, do not regard myself bound by that decision.

[19] In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation &Arbitration & Others (2007) 28 ILJ 2246 (LAC),* the Labour Appeal Court considered an appeal where initially the CCMA commissioner refused an application brought in terms of section 144 of

the Labour Relations Act for the rescission of default arbitration award. The Labour Court upheld the refusal on review, finding that good cause, the only ground relied on by the appellant, was not a ground for rescission of an award in terms of section 144. The appellant on appeal, contended that, although section 144 made no mention of good cause as a ground for rescission, the Labour Appeal Court had previously interpreted provisions of the LRA to include words that were not expressly part of those provisions. The appellant inter alia relied on its submission on the decision in *Queenstown Fuel Distributors CC v Labuschagne NO C & others (2000) 21 ILJ 166 (LAC)*, where it was held that, although section 145 of the Labour relations Act did not expressly give the Labour Court the power to condone non-compliance with the time-limit set out therein, the section was directory and had to be read so as not to exclude its power to condone non-compliance with the time-limit. The Court accepted that section 144 did not make any provision for "good cause" to be shown in considering condonation for rescission of an award. However, following the decision in *Queenstown Fuel Distributors* the Court found that, as there are circumstances which can be envisaged, such as in that case, which fall outside the circumstances referred to in section 144, in such cases both logic and

common sense dictate that a defaulting party should, as a matter of justice and fairness, be afforded relief. The Court further held that, if one were to hold that section 144 does not allow for the rescission of an arbitration award in circumstances where good cause is shown and that an applicant who seeks rescission of an arbitration award is compelled to bring the application within the limited circumstances allowed by the wording of the section, this could lead to unfairness and injustice. The Court also reasoned that if the approach adopted by the commissioner and the Labour Court was to be adopted that, would be inconsistent with the spirit and the primary object of the Labour Relations Act. It was on the basis of that reasoning that the Court held that in interpreting section 144 so as to include 'good cause' as a ground for rescission gives the Labour Relations Act an interpretation that is in line with the right provided for in section 34 of the Constitution, because, if section 144 is not interpreted in this way, a party who can show good cause for its default will be denied an opportunity to exercise its right provided for in section 34 of the Constitution despite the fact that it may not have been at fault for its default.

[20] In my view the same principle as that enunciated in the *Shoprite Checkers case* is applicable in the present instance. Thus even though

section 68(3) is silent about "good cause" in the event of failure to comply with the time frame set out therein such a requirement should be read into the section.

[21]Turning to the brief facts in as far as failure to comply with the provisions of section 68(3) of the Labour Relations Act is concerned, it is common cause that, on 02 September 2009, the applicant addressed a notice of intention to launch this application against SAMWU should the notice of intention to embark on the strike not be withdrawn. In terms of that notice the applicant pointed out to SAMWU that it was required to withdraw the strike notice by Wednesday, 03 September 2009. By close of business 03 September 2009, SAMWU had not withdrawn the strike notice nor had it indicated such an intention. .

[22]On 04 September 2009, the applicant instructed its attorneys to prepare urgent papers. The applicant then prepared papers that form the basis of the present application over the weekend, with apparently the intention to file and serve them on Monday, 07 September 2009.

[23]In the case of *Sizabantu Electrical Construction v Gumbi and Others (1999) 20 ILJ 673 (LC) at 675* where the Court held that the requirements of good cause entails the following:

"The applicant must give a reasonable explanation for his default. If it appears that the default was willful or that it was due to gross negligence, the court should not come to his assistance; the application must be bona fide and not made with the intention of mainly delaying plaintiff's claim; the applicant must show that he has a bona fide defense to the plaintiff's claim. It is sufficient if it makes a prima facie defense in the sense of setting out averments which, if established at the trial, wood and ten to him to the relief as for."

[24] According to Mr Kennedy, who moved the application for condonation from the bar the reason why the applicant issued SAMWU with a notice shorter than the one required in section 68(3) was because the applicant operated under the incorrect understanding that the letter sent to SAMWU complied with the 5(five) day notice as required in that section. He correctly conceded that the letter did not comply with what was envisaged in section 68(3), which requires a formal application accompanied by supporting affidavits.

[25]There is no evidence that the erroneous assumption made by the applicant was deliberate, negligent and or intended to prejudice SAMWU in any way. Whilst SAMWU, was not served a proper notice

as required by section 68(3), it was however aware of the intention of the applicant.

[26]I am thus persuaded that the reason tendered by the applicant is reasonable and should be accepted. I am also persuaded that the issues related to this matter are important not only to the parties but probably to the sector in general. In fact even Mr Van der Riet in his submission conceded, although from a different perspective, that this matter was important to the parties.

[27]It was for the above reasons that I condoned the non compliance with the provisions of section 68(3) of the Labour Relations Act.

Application to interdict the strike

[28]The applicant contends that SAMWU does not have a right to strike for three reasons. The first reason is that the conciliating panelist upheld its point in *limine* that the divisional level of the bargaining council to which the dispute was referred had no jurisdiction to entertain it. And secondly that the issue of salaries and leave pay do not belong to the divisional level of the bargaining council. The third reason is that SAMWU cannot strike on the issue of an entitlement to leave pay because it is a right derived from the Basic Conditions of Employment Act ("BCEA").

[29] The applicant contended that it had in its submission demonstrated a clear right and for that reason sought a final relief. In the alternative the applicant contended that it had demonstrated a prima facie right for an interim relief. As would be apparent from the order I made I did not agree with the submission that the applicant had on its papers established a clear right to warrant granting a final relief. I however agreed with the alternative prayer for the interim relief.

[30]The requisites for a right to claim an interim interdict were reaffirmed in *National Council of SPCA v Openshaw 2008 (5) SA 339 (SCA) at 354* as being the following:

> *"(a) A prima facie right. What is required is proof of facts that establish the existence of a right in terms of substantive law;*
>
> *(b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; I*
>
> *(c) The balance of convenience favours the granting of an interim interdict;*
>
> *(d) The applicant has no other satisfactory remedy.'*

[31]The above requirements are discussed in details in a number of Courts decisions. I do not deem it necessary for the purpose of this judgment to go into those details. For those details see *Southernwind Ship Yard (Pty) Ltd v National Union of Metal Workers of SA and Others (2009) 30 ILJ 1369 (LC), Setlogelo v Setlogelo 1914 AD 221 at 227 and Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton 1973 (3) SA 685 (A) at 691C—E, Phutiyagae v Tswaing Local Municipality (2006) 27 ILJ 1921 (LC) at 1930A- J* and *Spur Steak Ranches v Saddles Steak Ranches 1996 (3) SA 706 (C) at 714B-C.*

[32]In my view on the facts and circumstance of this case the applicant has successfully demonstrated that it has a *prima facie* right not to be faced with a strike pending the outcome of the interpretation dispute referred to the bargaining council by the applicant.

[33]It was for the above reasons that I made the order quoted above.

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Molahlehi J

Date of judgment: 29 September 2009

Appearances:

For the applicant:Adv Kennedy SC

Instructed by:Werksman Attorneys.

For the respondent: Adv Van der Riet SC

Instructed by: Cheadle Thompson & Haysom Attorneys